84-517

NO. _____

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LARRY R. PARKER,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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3700

QUESTION PRESENTED FOR REVIEW

Whether, in a criminal prosecution for willfully failing to file income tax returns in which the defendant alleged his failure to file returns was negligent and that this negligence was caused by consuming personal or business affairs, the trial court erred by instructing the jury:

> A demonstration of a good purpose is not a defense, nor is it a defense that a person intended to file in the future or that he was too busy with personal or business affairs.

PARTIES

Pursuant to Court rule, the statement of the parties is omitted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LARRY R. PARKER,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
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OPINIONS BELOW

The opinions of the United States Court of Appeals, Eleventh Circuit, and the order of the United States District Court, Northern District of Florida, are unpublished.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 22, 1984, and a timely-filed petition for rehearing was denied on August 1, 1984 (A-2).[1] This petition is filed within sixty days of that date. This Court has jurisdiction under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

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[1] References to the appendix to this petition are by designation "A-__."

STATUTES INVOLVED

Section 7203 of the Internal Revenue Code of 1954 (26 U.S.C.) provides:

> **Willful failure to file return, supply information, or pay tax.** Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure.

STATEMENT OF THE CASE

On September 26, 1983 Petitioner Larry R. Parker was tried by jury in the United States District Court, Northern District of Florida, on three charges that he violated 26 U.S.C. 7203 in that he knowingly and willfully failed to file federal income tax returns for tax years 1978, 1979 and 1980. At trial, the parties agreed that in order for the government to prove its case it was required to establish three elements: (1) the defendant had a duty to file a tax return for each year in question; (2) he failed to file; and (3) his failure to file was willful. Parker, however, did not dispute that he had a duty to file returns or that he failed to file them; therefore, the only contested issue for

the jury to decide was whether his failure to file was "willful".

Parker's defense was that his failure to file tax returns was a result of negligence, perhaps gross negligence, but not willfulness. During the years in question, Parker testified, he had been consumed by business problems and by the impending break-up of his marriage. Parker testified that as a result of these pressing personal and business affairs he became negligent in dealing with many aspects of his life, including filing his tax returns.

At the jury instruction charge conference, the parties disagreed regarding the instruction on willfulness. The

government's proposed instruction read as follows:

> The third element which the government must prove beyond a reasonable doubt is the defendant's failure to make and file the returns in question was willful. I instruct you that the term willful for purposes of these instructions means voluntary, deliberately and intentionally as distinguished from accidentally, inadvertently, or negligently, it involves an intentional violation of a known legal duty. There is no necessity for the government to prove that a defendant had an intention to defraud the government or to evade payment of any taxes in order for a defendant's failure to file to be willful under the provisions of the law. A demonstration of a good purpose is not a defense, nor is it a defense that a person intended to file in the future or that he was too busy with personal or business affairs. If it is shown that the defendant intentionally violated a known legal duty to file a tax return, his reason for doing so is irrelevant.

Defense counsel objected to the next-to-last sentence in the proposed instruction on the ground that it improperly offered hypothetical factual examples and suggested that the examples were insufficient to constitute a defense as a matter of law (thereby invading the province of the jury), that it was an erroneous statement of the law, and that, at the least, it rendered the instruction prejudicially confusing and misleading. Based upon the prosecutor's representation that the sentence "comes almost directly" from Sansone v. United States, 380 U.S. 343 (1965), and that it was also the "holding" in Eustis v. United States, 409 F.2d 228 (9th Cir. 1969), the trial judge permitted the sentence to remain (A-7,9,10). The Court subsequently

granted a defense request to insert a sentence into the willfulness instruction which said that negligence, even gross negligence, does not constitute willfulness.

The instruction, with the addition just mentioned, was read to the jury (A-11). This was the only instruction on the critical element of willfulness.

The jury returned a verdict of guilty on all three counts, and Larry Parker was sentenced to fines and a term of imprisonment (A-3).

Parker appealed to the United States Circuit Court of Appeals, Eleventh Circuit, arguing, among other things, that the instruction on willfulness was

erroneous. On June 22, 1984, the Circuit Court issued a per curiam affirmance and, on August 1, 1984, it denied rehearing.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Jurisdiction was vested in the District Court, Northern District of Florida, the court of first instance in this cause, pursuant to 18 U.S.C. 3231.

REASONS FOR GRANTING THE WRIT

The federal question presented in this case might be phrased: To what extent can the government prosecute a taxpayer who has carelessly disregarded his duty to file income tax returns on time? The correct answer should be that the government properly cannot prosecute a citizen for failure to file income tax returns if the failure to file was caused by careless disregard or negligence. Haney v. United States, 315 F.2d 792 (5th Cir. 1963). Petitioner asks this Court to approve the principles set down in Haney 21 years ago and, in applying that principle to this case, to reverse Petitioner's conviction and order a new trial.

Section 7203 of the Internal Revenue Code of 1954 creates a specific intent crime. In order to convict, the government must prove that the defendant acted "with the specific intent to fail to do what the law requires." United States v. Rosenfield, 469 F.2d 598 (3rd Cir. 1972), cert. denied, 411 U.S. 932 (1973). This necessarily means that a defendant cannot be convicted if the jury believes his failure to file an income tax return was through negligence -- even gross negligence -- or inadvertence. It is not enough to convict if the facts show simply that the defendant knew he had a duty to file yet failed to file; the jury must examine the evidence to determine whether the defendant deliberately intended not to file or, instead, whether his action (or inaction) was due to

negligence, careless disregard for his duty to file, or due to gross negligence.

Petitioner was denied the opportunity to have the jury consider his negligence or "careless disregard" defense. Parker had attempted to show that his failure to file tax returns was not willful, but negligent, and that the basis for this negligence was a preoccupation with certain business and personal affairs. Under these circumstances it was error for the trial court to instruct the jury:

> A demonstration of a good purpose is not a defense, nor is it a defense that a person intended to file in the future, or that he was too busy with personal or business affairs (A-12).

Although the court properly told the jury that negligence, even gross negligence,

cannot constitute the element of willfulness, the judge then told the jury that when it made the determination of negligence, it could not consider Parker innocent if his negligence was caused by being "too busy with personal or business affairs." Coming as it did at the end of the instruction on willfulness, this sentence had the effect of qualifying or subordinating the preceding portion of the instruction, which had said that negligence does not constitute willfulness. Read in its entirety, the instruction on willfulness improperly neutralized Parker's proper lawful negligence defense.

The instruction was a contortion of the law, yet it has received the imprimatur of the Eleventh Circuit in this case.

The prosecutor created the problem when, during the charge conference, he insisted that the objectionable phrasing was "the holding" in Eustis v. United States, 409 F.2d 228 (9th Cir. 1969).[2] However, the Eustis opinion did not hold, despite the government's argument to the contrary, that a defendant cannot establish "a defense" by proving that he was so busy with personal or business affairs that he became negligent. The extremely brief

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[2] When these sentences were discussed at the charge conference, the prosecutor told the trial court: "Your Honor that's the holding in Eustis v. United States which we have cited there (on the proposed instruction), and these are not matters of fact Mr. Dewrell [defense counsel] wants to argue; these are matters of law that the courts have determined are not defenses to this case, so its difficult to see how they can get up there and say that this is not just matters of fact (sic) for the jury to decide. It's not. It's matters of law (sic) and the courts have ruled those are not defenses and the jury ought to know that."

Eustis opinion simply held that under the circumstances presented there, the defendant had failed to show that he was negligent. Eustis was a sufficiency of evidence case turning upon a question of fact, not law. The language of the opinion does not authorize the jury instruction now at issue. Nevertheless, the trial judge apparently believed that Eustis controlled this case.

Eustis cited as sole authority the opinion in Edwards v. United States, 375 F.2d 862 (9th Cir. 1967), which was another sufficiency of evidence appeal by a defendant. There, the appellant was an experienced tax attorney who claimed that he had been too busy with other matters and simply overlooked his obligation to file tax returns. The judge, as trier of

fact, did not believe him. The Edwards court's only pertinent statement on this issue was: "The [fact-finder] understandably refused to credit this explanation." 375 F.2d 864. The court clearly did not preclude the fact-finder from considering the defendant's theory of his defense and acquitting, should it find the defense of "business preoccupation" believable.

The fact remains that if a defendant can convince the jury that he was so busy -- for whatever reason -- that he negligently, or through gross negligence, overlooked his duty to file a return, he has established "a defense" to the element of willfulness in Section 7203. Therefore, the instruction was an erroneous statement of the law, and its

obvious prejudicial impact on the defendant's case requires that Parker should be granted a new trial.

Similarly, the instruction is either prejudicially misleading or just plain wrong in telling the jury that "[a] demonstration of a good purpose is not a defense, nor is it a defense that a person intended to file in the future." At the charge conference the prosecutor convinced the judge that this portion of the instruction "comes almost directly" from Sansone v. United States, 380 U.S. 343 (1965). However, the Sansone defendant had been charged with deliberately understating his income on a return, and he admitted to deliberately falsifying his returns. His "defense" was that he had intended to pay the tax at some

future time. The Court held that the good intention to report income and to pay tax at some future date is not a defense to a charge that the defendant willfully understated his tax liability on the returns. 380 U.S. 354. The Court noted that the crime "was complete as soon as the false and fraudulent understatement of taxes ... was filed." Id. Thus Sansone merely stated in pertinent part that if a defendant's violation of the law was admittedly deliberate or willful, it is immaterial that it was done with "good motives" or "bad motives."[3] Here, however, the deliberateness of the defendant's actions was the sole issue at trial. If the jury

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[3] For a discussion on "intent" versus "motive" see United States v. Malinowski, 472 F.2d 850, 855 (3rd Cir. 1973), cert. denied, 411 U.S. 970 (1973).

believed that Parker had good purpose and had always been possessed of a bona fide intent to file, as he testified, it would be more likely to find that his failure to file was negligent, not willful. However, by instructing the jury with the above-quoted sentence, the judge improperly eliminated good purpose and good intent from the jury's consideration.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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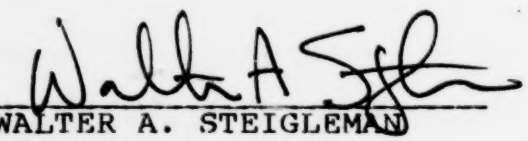
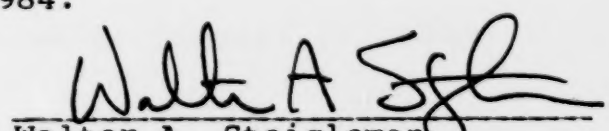
By: 
WALTER A. STEIGLEMAN
Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this petition have been served upon all parties who are required by the Rules of the Supreme Court to be served. Those parties are: The Solicitor General, U.S. Department of Justice, Room 5614, Washington, D.C. 20530; Glenn L. Archer, Jr., Assistant Attorney General, Tax Division, U.S. Department of Justice, Washington, D.C. 20530; and W. Thomas Dillard, United States Attorney, 100 Palafox Street, Room 307, Pensacola, Florida 32501. Service was accomplished by depositing copies of this petition in the United States mail, first-class postage prepaid, addressed to the above-named individuals, this 28th day of September, 1984.



Walter A. Steigleman

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3658
Non-Argument Calendar

D.C. Docket No. PCR-83-00422-01

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY R. PARKER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida

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(June 22, 1984)

Before GODBOLD, Chief Judge, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM: AFFIRMED.
See Circuit Rule 25.

Judgment Entered: June 22, 1984
For the Court: Spencer D. Mercer, Clerk

ISSUED AS MANDATE: August 22, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3658

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY R. PARKER,

Defendant-Appellant.

- - - - - - - - - - - - - - - -

Appeal from the United States District Court for the Northern District of Florida

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ON PETITION FOR REHEARING

(August 1, 1984)

Before GODBOLD, Chief Judge, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:
United States Circuit Judge

UNITED STATES DISTRICT COURT FOR
NORTHERN DISTRICT OF FLORIDA

Defendant: Larry R. Parker
Docket No.: PCR 83-00422-01

JUDGMENT AND PROBATION/COMMITMENT ORDER

10/25/83

Finding and Judgment: There being a verdict of GUILTY. Defendant has been convicted as charged of the offense(s) of violating Title 26, United States Code, Section 7203, as charged in the three-count superseding indictment.

Sentence or Probation Order: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby

committed to the custody of the Attorney General or his authorized representative for a period of one (1) year and pay a fine to the United States of $5,000.00, plus costs of prosecution, with the defendant to stand committed until the fine is paid or he is otherwise discharged by due course of law on Count I of the Indictment; that the defendant be so committed for a period of one year (1) and pay a fine to the United States of $5,000.00, plus costs of prosecution, with the defendant to stand committed until the fine is paid or he is otherwise discharged by due course of law on Count II of the Indictment, with the sentence of imprisonment imposed on Count II to run concurrently with the sentence of imprisonment imposed on Count I; that the

defendant be so committed for a period of one (1) year and pay a fine to the United States of $5,000.00, plus costs of prosecution, with the defendant to stand committed until the fine is paid or he is otherwise discharged by due course of law on Count III of the Indictment, with the sentence of imprisonment imposed on Count III to run concurrently with the sentence of imprisonment imposed on Counts II and I of the Indictment.

TOTAL SENTENCE IMPOSED: 1 YEAR IMPRISONMENT - $15,000.00 FINE, PLUS COSTS OF PROSECUTION.

Signed by U.S. District Judge
William Stafford
Date: October 25, 1983

TRIAL COURT'S RULING ON "WILLFULNESS" INSTRUCTION

THE COURT: Where is your instruction on willfulness?

MR. DEWRELL: Judge, I have no problem with the government's instruction down to the last two sentences.

MR. HARTNETT: Your Honor, I don't want to interrupt the Court's thinking process on this but I do want to be heard on it.

THE COURT: Yes, all right. I have not done anything in this trial yet unilaterally, Mr. Hartnett. I don't want to start at this point.

MR. HARTNETT: Right.

MR. DEWRELL: As a matter of fact, Judge, to further delineate it, I don't even have any objection to the last sen-

tence. I think that's a correct statement of the law. The problem I have is the examples given in the next to the last sentence. Those are, it seems to me, fact questions to be determined by the jury on the issue of what is willful.

THE COURT: All right.

MR. HARTNETT: Your Honor, that statement, that sentence, comes almost directly out of a United Sates Supreme Court case called Sansone v. United States. I don't cite it in here because, frankly, I was astonished that this even came up. Intent to file in the future is not a defense to the crime and I think if the United States Supreme Court says it, that's certainly the state of the law. And if the defense wants to argue that as a defense, they're just wrong on that and

I think the jury ought to be told it's not a defense to this crime. And the case law is just abundant that that is not a defense.

THE COURT: How are you going to argue this thing, Mr. Dewrell? I mean is that going to be your - of course, I heard Mr. Parker testify, but is it going to be your -

MR. DEWRELL: My argument, Your Honor, is going to be centered around the voluntary, intentional violation of a known legal duty. It's not, I don't say that, and really I don't have a big problem with the one clause that the government has selected out. The problem I have with it is the demonstration of a good purpose is not a defense. I don't think that's the law.

MR. HARTNETT: That is indeed the law, Your Honor.

MR. DEWRELL: Or that a person was too busy with personal or business affairs. I think all that goes to whether he was willful or not.

MR. HARTNETT: Your Honor, that's the holding in Eustis v. United States which we have cited there, and these are not matters of fact Mr. Dewrell wants to argue; these are matters of law that the courts have determined are not defenses to this case, so it's difficult to see how they can get up there and say that this is just matters of fact for the jury to decide. It's not. It's matters of law and the courts have ruled those are not defenses and the jury ought to know that.

THE COURT: Well, that's my understanding of the law, Mr. Dewrell, and I think if the government requests it, and it's certainly going to be an issue in this case, I believe they are entitled to this instruction.

TRIAL COURT'S INSTRUCTION ON "WILLFULNESS"

The third element which the government must prove beyond a reasonable doubt is the defendant's failure to make and file the returns in questions was willful. I instruct you that the term "willful," for purposes of these instructions, means voluntarily, means voluntary (cq), deliberately and intentionally, as distinguished from accidentally, inadvertently or negligently.

Negligence, even gross negligence, does not amount to willfulness. Willfulness involves an intentional violation of a known legal duty.

There is no necessity for the government to prove that a defendant had

an intention to defraud the government or to evade payment of any taxes in order for a defendant's failure to file to be willful under the provisions of the law.

A demonstration of a good purpose is not a defense, nor is it a defense that a person intended to file in the future, or that he was too busy with personal or business affairs. If it is shown that the defendant intentionally violated a known legal duty to file a tax return, his reason for doing so is irrelevant.